

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF  
TRANSPORTATION, AND SOUTHGATE  
DEVELOPMENT COMPANY,

Defendants.

Case No. C05-5447 RJB

**ORDER GRANTING PLAINTIFF'S  
MOTION TO LIMIT REVIEW TO  
ADMINISTRATIVE RECORD; AND  
ORDER GRANTING PLAINTIFF'S  
MOTION FOR A PROTECTIVE  
ORDER LIMITING DISCOVERY**

This matter comes before the Court on Plaintiff's motion to limit judicial review to the administrative record and motion for a protective order limiting discovery. Dkt. 57. The Court has considered the pleadings filed in this matter and the file within.

**FACTUAL AND PROCEDURAL HISTORY**

This dispute arose over the response and clean-up costs regarding the release of hazardous substances at the Palermo Wellfield Superfund Site in Tumwater, Washington. The United States seeks to recover both past and future costs incurred by the Environmental Protection Agency and the U.S. Department of Justice in this matter, pursuant to Sections 107(a) and 113(g)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). See 42 U.S.C. §§ 9607(a), 9613(g)(2).

1 According to Plaintiff's Complaint (Dkt. 1), the Palermo Wellfield Superfund Site consists of a  
2 contaminated drinking water aquifer, including contaminated surface water and groundwater, in the  
3 vicinity of the Palermo Wellfield and Palermo neighborhood, both located within the Deschutes River  
4 Valley and the adjacent upland area to the west. The Palermo Wellfield provides drinking water for  
5 the City of Tumwater, Washington.

6 Routine sampling by the City of Tumwater on August 3, 1993, detected the chlorinated  
7 solvent trichloroethene ("TCE") in three of the City's wells at levels up to 12.6 micrograms per liter  
8 ("ug/L"). Additional sampling performed on August 6, 1993, confirmed these results, and a field  
9 investigation conducted that month revealed the presence of TCE in groundwater and scattered low  
10 levels of trans-1,2-dichloroethene ("DCE") and perchlorethene ("PCE"). The City of Tumwater then  
11 notified the public regarding the discovery of TCE in the three contaminated wells and removed those  
12 wells from service.

13 The EPA proposed the Site for addition to the National Priorities List ("NPL") on December  
14 23, 1996, and added the Site to the list on April 1, 1997. *See* 40 C.F.R. Part 300, Appendix B. The  
15 NPL is a national list of hazardous waste sites posing the greatest threat to health, welfare, and the  
16 environment. The NPL has been established pursuant to Section 105(a) of CERCLA, 42 U.S.C. §  
17 9605(a).

18 An EPA contractor initiated removal actions at the Site in March 1998 to address immediate  
19 risks to human health and the environment from TCE and PCE in soil and groundwater. One  
20 component of this removal action consisted of the installation and operation of a soil vapor extraction  
21 ("SVE") system at the former Southgate Dry Cleaners location. The purpose of this action was to  
22 remove PCE from soil in order to halt its ongoing release to groundwater. The SVE system began  
23 operation in 1998 and was decommissioned in June 2000. The EPA estimates that the SVE system  
24 removed approximately 425 pounds of PCE from soils beneath Southgate Dry Cleaners.

25 A second component of the removal action was the installation of two air strippers at the  
26 Palermo Wellfield to remove TCE from the city's well water. The air stripping system was completed  
27 in 1999 and successfully reduced TCE in treated water to below laboratory detection levels. The  
28 three Palermo wells that were shut down due to TCE contamination have been returned to

1 production.

2 On November 16, 1999, the Regional Administrator for EPA Region 10 signed a Record of  
3 Decision ("ROD") documenting the long-term remedy selected for the Site. The ROD called for the  
4 continued operation and maintenance of the SVE system and the wellhead air stripping system.  
5 Additionally, the ROD required (1) the installation of a subdrain system and construction of a  
6 treatment lagoon west of the residences on Rainier Avenue to collect and treat PCE and TCE-  
7 contaminated groundwater that is surfacing at the base of the Palermo Bluff, (2) appropriate  
8 governmental notification regarding the areal extent of groundwater contamination to ensure that  
9 additional supply wells are not placed in contaminated sections of the aquifer, and (3) initiation of a  
10 long-term groundwater monitoring program.

11 According to Plaintiff's Complaint, the two defendants named in this action were primarily  
12 responsible for the release of the above hazardous materials into the environment, which ultimately  
13 contaminated the Palermo Wellfield Site. Dkt. 1 at 6-9.

14 Southgate Shopping Center consists of about five acres and is located at 5203 Capital  
15 Boulevard, Tumwater, Washington. Southgate Development Company ("SDC"), a Washington  
16 corporation, owns Southgate Shopping Center and has owned it since 1960. Southgate Dry Cleaners  
17 has been in operation in the Southgate Shopping Center since 1964 and has used dry cleaning fluids  
18 containing PCE since that time. Throughout the area of the Southgate Shopping Center, PCE has  
19 been detected in soil samples collected from the ground surface to where groundwater is encountered.

20 The highest PCE concentrations observed at the Palermo Wellfield Site were collected at the  
21 base of a sump inside the Southgate Dry Cleaners, and groundwater samples in the area of the  
22 Southgate Shopping Center contained PCE concentrations exceeding 900 parts per billion (ppb).  
23 Plaintiffs allege that PCE was disposed of in this sump and was released from this sump to subsurface  
24 soils and groundwater from at least the mid-1970s until at least 1990, when waste disposal records  
25 indicate that PCE waste may no longer have been disposed of in the sump.

26 During the late 1960's and early 1970's, the Washington Department of Transportation  
27 ("WDOT") operated a small materials testing laboratory on a leased parcel on the southwest corner of  
28 the intersection of Trosper and Littlerock Roads in Tumwater. TCE was used at this facility and, for

1 some period of time, waste TCE reportedly was disposed of on the gravel driveway behind WDOT's  
2 testing facility. According to the United States, sampling in the area of the gravel driveway has  
3 detected TCE in the near surface soils, as well as in the groundwater and in subsurface soils. This  
4 sampling data is consistent with disposals of TCE in the area of the driveway during WDOT's lab  
5 operation on the property.

6 WDOT also owns and operates a materials testing facility located at 1655 South Second  
7 Avenue in Tumwater. WDOT began using TCE at this facility before or during 1970. A 600 gallon  
8 underground storage tank was installed in 1970 adjacent to the west end of the testing facility. Floor  
9 drains, as well as certain laboratory sinks, drained to a concrete trench beneath the floor of each  
10 laboratory. A WDOT contractor issued a report in 1996 noting, among other things, that "there was a  
11 known release" from the tank in 1970. Dkt. 1 at 8. This report also contains observations that the  
12 release had flowed back into the facility through the concrete trench and that the ground above the  
13 tank was wet.

14 The 600 gallon underground storage tank was removed in 1996. Prior to its removal, the tank  
15 was filled with fluid. A sample of the fluid prior to the tank's removal confirmed the presence of  
16 TCE. A soil sample taken from the base of the tank excavation following the tank's removal also  
17 detected TCE.

18 According to Plaintiff's Complaint (Dkt.1), the EPA notified the State of Washington several  
19 years ago regarding its alleged liability in this matter in accordance with CERCLA Section  
20 121(f)(1)(F), 42 U.S.C. § 9621(f)(1)(F) and the NCP. The EPA and the State of Washington have  
21 engaged in negotiations for approximately two years over who is responsible for the costs incurred by  
22 the United States. Those negotiations have been unsuccessful.

23 On July 5, 2005, the United States filed this action in federal court contending that it has  
24 incurred more than \$11 million in costs to date in relation to the response and clean-up of the Palermo  
25 Wellfield Superfund Site. Dkt. 1 at 6. The United States seeks (1) reimbursement of all past and  
26 future costs to be incurred in this matter, and (2) a declaratory judgment of Defendants' liability,  
27 strictly, jointly and severally, for all such costs. *Id.* at 9. Defendants have denied all responsibility for  
28 the costs associated with the response and clean-up of the Palermo Wellfield Superfund Site. Dkts. 10

1 & 15.

2 **PLAINTIFF'S MOTION FOR AN ORDER LIMITING REVIEW TO ADMINISTRATIVE**  
 3 **RECORD AND MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY**

4 On June 29, 2006, Plaintiff filed a motion for a protective order limiting discovery. Dkt 57.  
 5 While Plaintiff's motion brief focuses primarily on limiting discovery, Plaintiff makes two separate and  
 6 distinct requests. First, Plaintiff requests that the Court limit its review of the EPA's selection of  
 7 response actions (i.e., remedy selection decisions) at the Palermo Wellfield Superfund Site solely to  
 8 the administrative record unless Defendants can provide a valid reason for supplementing the  
 9 administrative record. *Id.* at 3. Second, Plaintiff requests a protective order limiting discovery to  
 10 preclude issues regarding the EPA's selection of response actions that go beyond the administrative  
 11 record. *Id.* The Court has chosen to construe Plaintiff's brief as containing these two separate  
 12 motions, and will discuss each in turn below.

13 In its motion brief, the United States alleges that Defendants have sought discovery beyond the  
 14 scope of the administrative record regarding whether the EPA's selection of response actions at the  
 15 Palermo Wellfield Superfund Site was appropriate, and fears that Defendants will continue to do so.  
 16 *Id.* at 5. Specifically, the United States alleges that Defendant WSDOT recently questioned a  
 17 deponent regarding the reasons for the EPA's selection of specific response actions, and the United  
 18 States anticipates that one or both Defendants will continue to pursue this line of questioning in  
 19 upcoming depositions of EPA employees. *Id.* at 5-6. Additionally, Defendant WSDOT has recently  
 20 disclosed expert opinions challenging the EPA's response action selections, and the United States  
 21 expects that both Defendants intend to depose the United States' expert witnesses on this topic. *Id.* at  
 22 6.

23 As authority for its motions, the United States cites Section 113(j) of CERCLA, which  
 24 provides that "judicial review of any issues concerning the adequacy of any response action taken" by  
 25 the EPA "shall be limited to the administrative record." *See* 42 U.S.C. §§ 9613(j)(1). The United  
 26 States further contends that the Court must uphold the response actions selected by the EPA "unless  
 27 the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and  
 28 capricious or otherwise not in accordance with law." *See* 42 U.S.C. §§ 9613(j)(2).

In its Response, Defendant WSDOT states that it intends to show that the EPA's decisions at

the Palermo Wellfield were arbitrary and capricious because the administrative record does not support those decisions. Dkt. 65 at 2-3. Moreover, Defendant WSDOT contends that discovery should be permitted to include issues beyond the administrative record because the record does not demonstrate that the EPA considered all the relevant factors and does not explain the grounds for the EPA's decision. *Id.* at 4. Defendant WSDOT has already deposed three EPA officials who were involved at the Palermo Site, and plans to depose one more. *Id.* Pursuant to the Court's Order on January 24, 2006, discovery is to be completed by July 21, 2006. Dkt. 33.

### APPLICABLE STANDARDS

Section 113(j) of CERCLA provides that judicial review of the EPA's remedy selection decisions must be based on the administrative record, applying the arbitrary and capricious standard. *See* 42 U.S.C. § 9613(j); *Washington State Dept. of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 802 (9th Cir. 1995) (applying 42 U.S.C. 9613(j)).

Section 113(j)(1) of CERCLA, entitled "Judicial review," provides:

#### (1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President [through the EPA] shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

#### (2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

#### (3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the national contingency plan.

*See* 42 U.S.C. § 9613(j).

An agency's decision is arbitrary and capricious if:

... the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it would not be ascribed to a difference in view or the product of agency expertise.

1 *See Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 701 (9th Cir. 1996) (quoting  
 2 *Motor Vehicles Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The factors  
 3 that Congress intended the EPA to consider when selecting a remedy under CERCLA are set forth in  
 4 the national contingency plan ("NCP"). *See* 42 U.S.C. § 9604(a)(1).

5 In providing for deferential review on the administrative record, CERCLA conforms to  
 6 established rules of administrative law. *See e.g. United States v. Iron Mountain Mines, Inc.*, 987 F.  
 7 Supp. 1250, 1255 (E.D. Cal. 1997); *United States v. Seymour Recycling Corp.*, 679 F. Supp. 859,  
 8 861 (S.D. Ind. 1987); *United States v. Princeton Gamma-Tech, Inc.*, 817 F. Supp. 488, 492 (D.N.J.)  
 9 (citing the Administrative Procedures Act, 5 U.S.C. § 706(2)(A)) *reversed on other grounds*, 31 F.3d  
 10 139 (3rd Cir. 1994). The statutory rule of deference reflects Congress' judgment that, unlike a  
 11 reviewing court, the EPA has the specialized knowledge and expertise needed to choose the  
 12 appropriate cleanup method. *See Washington Natural Gas*, 59 F.3d at 802; *United States v. Akzo*  
 13 *Coatings of Am., Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991).

#### 14 DISCUSSION

15 The United States moves to limit review of the response actions selected by the EPA for the  
 16 Palermo Wellfield Superfund Site to the administrative record. At issue is the Record of Decision  
 17 (ROD) discussed above. The United States also seeks a protective order limiting discovery of any  
 18 issues that go beyond the administrative record with regard to the response actions selected by the  
 19 EPA for the Palermo Wellfield Superfund Site. These two motions will be discussed as follows:

#### 20 **A. MOTION TO LIMIT REVIEW OF THE EPA'S RESPONSE ACTIONS TO THE** 21 **ADMINISTRATIVE RECORD**

22 Plaintiff contends that Defendants should be limited to the administrative record when  
 23 advancing arguments that the response actions selected by the EPA were inconsistent with the national  
 24 contingency plan, or arbitrary and capricious, or otherwise not in accordance with the law. Under  
 25 CERCLA, judicial review generally is limited to the administrative record as it existed at the time of  
 26 the agency action. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Thompson v. Dept. of Labor*, 885  
 27 F.2d 551, 555-56 (9th Cir. 1998). Thus, as a general rule, information created or discovered after an  
 28 agency has made a decision will not be considered. *See United States v. Amtreco, Inc.*, 806 F. Supp.  
 1004, 1007 (M.D. Wis. 1992) (citing *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323 (7th Cir.



1 1983). This includes documents, deposition testimony, and expert opinions generated during the  
2 course of litigation. *See Iron Mountain Mines, Inc.*, 987 F. Supp. at 1260.

3 Section 113(j) does provide, however, that “applicable principles of administrative law shall  
4 govern whether any supplemental materials may be considered by the court.” *See* 42 U.S.C. §  
5 9613(j)(1). Principles of administrative law require that the administrative record be supplemented  
6 where: (1) the agency has failed to explain its actions, making judicial review of whether the agency  
7 has considered all relevant factors impossible; (2) the agency has relied on documents or materials not  
8 included in the record; (3) supplementation is necessary to explain technical terms or complex subject  
9 matter involved in the agency action; or (4) a strong showing of agency bad faith is made. *See Inland*  
10 *Empire*, 88 F.3d at 703-04 (citing *Friends of the Payette v. Horseshoe Brand Hydroelectric Co.*, 988  
11 F.2d 989, 997 (9th Cir. 1993) and *Nat’l Audubon Soc’y v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 n.9  
12 (9th Cir. 1994)); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436-37 (9th Cir. 1988). The party  
13 challenging the adequacy of the administrative record or the administrative process has the burden of  
14 showing that supplementation is warranted. *See Princeton Gamma-Tech*, 817 F. Supp. at 493;  
15 *Amtreco*, 806 F. Supp. at 1005.

16 In the instant case, Defendants have argued that the administrative record does not  
17 demonstrate that the EPA considered all relevant factors and does not explain the grounds for the  
18 EPA’s decision. Moreover, Defendants have argued that supplementation through discovery is  
19 necessary to explain technical terms and complex subject matter. Defendants have failed, however, to  
20 adequately develop any of these arguments to meet their burden of showing that supplementation is  
21 warranted. Defendants have not pointed to anything in the administrative record to support their  
22 arguments, nor have they explained how, exactly, the record is lacking or how supplementation  
23 through discovery will help to explain technical terms and complex subject matter in this case.  
24 Moreover, Defendants have failed to explain why the administrative record needs to be supplemented  
25 with specific regard to the *response actions* selected by the EPA. Therefore, given the strong and  
26 clear intent behind Section 113(j)(1) of CERCLA to limit judicial review to the administrative record  
27 in the absence of the above exceptions, Plaintiff’s motion to limit review of the EPA’s selection of  
28 response actions to the administrative record should be granted.



1 **B. PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER LIMITING DISCOVERY**

2 The United States also seeks a protective order limiting discovery of any issues that go beyond  
 3 the administrative record with regard to the response actions selected by the EPA for the Palermo  
 4 Wellfield Superfund Site. The United States argues that such an order is consistent with Fed. R. Civ.  
 5 P. 26(b), which requires that discovery be "reasonably calculated to lead to the discovery of admissible  
 6 evidence." Pursuant to Fed. R. Civ. P. 26(c)(1), counsel for the United States has filed a certificate  
 7 stating that she has attempted to confer with all parties in this matter in an effort to solve this dispute  
 8 before filing this motion for a protective order. Dkt. 57(2).

9 Given that the Court has decided to grant Plaintiff's motion to limit review of the EPA's  
 10 response actions to the administrative record, Plaintiff's request for a protective order to limit  
 11 discovery is appropriate under the circumstances. *See Hayasupai Tribe v. Robertson*, 943 F.2d 32, 34  
 12 (9<sup>th</sup> Cir. 1991) (affirming district court's limitation of the scope of its review to the administrative  
 13 record and prohibiting discovery when parties pointed to nothing in support of their contention that  
 14 the agency had acted in bad faith or relied on materials outside the record); *Animal Defense Council*,  
 15 840 F.2d at 1436-1438 (affirming district court's limitation of review to administrative record and  
 16 prohibiting discovery because plaintiffs did not show record presented was insufficient for review or  
 17 applicability of any of the exceptions to the general rule that review of agency action is limited to the  
 18 record), *modified*, 867 F.2d 1244 (9th Cir. 1989). Plaintiff's request for a protective order should be  
 19 granted.

20 **ORDER**

21 Therefore, it is hereby

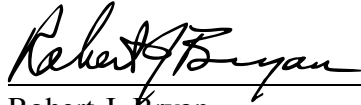
22 **ORDERED** that Plaintiff's Motion for a Protective Order and to Limit Discovery Pursuant to  
 23 Section 113(j) of CERCLA (Dkt. 57) is **GRANTED** as follows:

24 (1) Plaintiff's motion to limit review of the response actions selected by the EPA for the  
 25 Palermo Wellfield Superfund Site to the administrative record is **GRANTED**, and

26 (2) Plaintiff's motion for a protective order limiting discovery to preclude issues that go  
 27 beyond the administrative record with regard to the response actions selected by the EPA for the  
 28 Palermo Wellfield Superfund Site is **GRANTED**.

1 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of  
2 record and to any party appearing *pro se* at said party's last known address.

3 DATED this 17<sup>th</sup> day of July, 2006.

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5 Robert J. Bryan  
6 United States District Judge  
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